

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

IN RE: PHENYLPROPANOLAMINE  
(PPA) PRODUCTS LIABILITY  
LITIGATION,

MDL NO. 1407

ORDER GRANTING  
DEFENDANT'S MOTION TO  
DISMISS

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This document relates to:

*Evans v. Wyeth*, C03-3610

This matter comes before the court on a motion to dismiss filed by defendant Wyeth. Having considered the briefs filed in support of and opposition to this motion, the court finds and rules as follows.

This case was filed by plaintiff Maggie Pearl Evans, on behalf of herself and her deceased husband Johnnie Evans, on December 30, 2002 in Mississippi state court, and was subsequently transferred to this MDL. Mrs. Evans passed away on February 10, 2003. On May 25, 2005, Wyeth filed a suggestion of death pursuant to Fed. R. Civ. P. 25(a)(1). That rule provides, in relevant part,

If a party dies and the claim is not thereby extinguished, the court may order substitution of the proper parties. The motion for substitution may be made by any party. . . . Unless the motion for substitution is made not later than 90 days after the death is suggested

1 upon the record by service of a statement of the fact  
2 of the death as provided herein for the service of the  
3 motion, the action shall be dismissed as to the de-  
4 ceased party.

5 Plaintiff filed a motion to substitute daughter Cassandra  
6 Evans on August 19, 2005 only days before expiration of the 90-  
7 day period. In an order dated December 1, 2005, the court denied  
8 plaintiff's motion, finding that Cassandra Evans had not been  
9 appointed personal representative of her mother's estate, and  
10 therefore was not a proper substitute in this action.

11 Wyeth now asks that the court dismiss this matter on two  
12 independent grounds. Wyeth first argues that absent a finding of  
13 excusable neglect justifying an extension of the 90-day deadline,  
14 dismissal of Evans' case is mandatory. See Fed. R. Civ. P.  
15 25(a)(1) (in the event of noncompliance, "the action *shall* be  
16 dismissed as to the deceased party") (emphasis added). Wyeth  
17 argues that plaintiff has neither requested nor received an  
18 extension of time from this court, and has failed to put forth  
19 any circumstances supporting a finding of excusable neglect. To  
20 date, Cassandra Evans has still not been appointed personal  
21 representative of her mothers' estate, nor has plaintiff made an  
22 effort to substitute any other party to this action.

23 Wyeth also moves for dismissal on the grounds that plaintiff  
24 has not submitted a PFS complete in all respects, as required by  
25 CMOs 6 and 19. According to Wyeth, deficiencies include failure  
26 of plaintiff (or a legal representative) to sign the declaration  
form attached to the PFS, and failure to submit HIPAA-compliant

1 authorization forms.<sup>1</sup>

2 In her response plaintiff does not request an enlargement of  
3 time, and sets forth no set of facts in an attempt to excuse her  
4 neglect. Instead, plaintiff responds that the court's December 1,  
5 2005 order denying her motion to substitute provided "[a]t such  
6 time as Cassandra Evans is able to act on behalf of the estate,  
7 counsel may file a new motion for substitution." Dec. 1, 2005  
8 Order at 2. Although she does not explicitly so argue, plaintiff  
9 is apparently asking the court to construe this language as a  
10 blanket extension of the Fed. R. Civ. P. 25(a)(1) deadline.

11 Plaintiff submits that Cassandra Evans has now been ap-  
12 pointed the administrator of her mother's estate; and that she is  
13 the "legal heir" of her parents' estate; and that under Missis-  
14 sippi law, "Damages for the injury and death of a married man  
15 shall be equally distributed to his wife and children." She  
16 concludes that a new motion for substitution will be forthcoming.  
17 Plaintiff does not address defendant's motion for dismissal for  
18 failure to submit a PFS complete in all respects.

19 The court finds that plaintiff has failed to comply with the  
20 rules governing the substitution of a legal representative of  
21 plaintiff's estate. The 90-day period provided by the rule has  
22 lapsed, and nothing in the court's order denying substitution  
23 provides for abrogation of the rule's deadline. Indeed, under the

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25 <sup>1</sup>Instead, both forms were signed by Katrina Evans,  
26 plaintiff's daughter. Neither party argues that Katrina is  
authorized to act on her father's behalf.

1 circumstances an extension of the deadline would have been  
2 improper, as one was never requested. Wyeth therefore never had a  
3 chance to argue whether plaintiff was entitled to an extension;  
4 to construe the court's language now as granting one would be a  
5 windfall to plaintiff and a denial of Wyeth's due process.

6 At bottom, plaintiff has failed to obtain substitution  
7 within the prescribed time, and has failed to demonstrate - or  
8 even to attempt to demonstrate - excusable neglect. That  
9 Cassandra Evans is the administrator of her mother's estate, or  
10 that she is her parents' legal heir, has no bearing on this  
11 conclusion. Under the plain language of Fed. R. Civ. P. 25(a)(1),  
12 plaintiff's case must be dismissed.

13 The court also finds in the alternative that the case  
14 warrants dismissal for failure to comply with the directives of  
15 CMOs 6, 6A, 19 and 19A. The PFS is not complete in all respects  
16 as required by these orders, a fact that plaintiff does not  
17 dispute. Under the standard for dismissal for failure to comply  
18 with a court order, the court is to evaluate (1) the public's  
19 interest in expeditious resolution of litigation; (2) the court's  
20 need to manage its docket; (3) the risk of prejudice to the  
21 defendants; (4) the public policy favoring disposition of cases  
22 on their merits; and (5) the availability of less drastic  
23 sanctions. *Malone v. United States Postal Serv.*, 833 F.2d 128,  
24 130 (9th Cir. 1987). In this case, defendant served the PFS  
25 nearly two and a half years ago; plaintiff's delay has thwarted  
26 the public's interest in the expeditious resolution of this

1 matter. Plaintiff's continuing delay also impedes the ability of  
2 the court to manage its docket, problems compounded by the  
3 complex nature of the multi-district litigation. The court also  
4 finds that plaintiff's delay is prejudicial to defendants,  
5 impairing defendants' ability to discover evidence before it is  
6 lost. Finally, plaintiff's extreme recalcitrance in all aspects  
7 of this case, including failure to move to substitute until days  
8 before the deadline (and years after plaintiff's death); failure  
9 to see a party properly appointed legal representative of the  
10 plaintiff's estate; failure to seek an enlargement of time of the  
11 relevant deadlines; failure to submit a PFS that is complete in  
12 all respects; and other blatant failures in the conduct of this  
13 case indicate to the court that less drastic measures would be  
14 futile.

15 For both of the foregoing alternative grounds, the court  
16 GRANTS defendant's motion. This case is DISMISSED.

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18 DATED at Seattle, Washington this 29th day of March, 2006.  
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22 BARBARA JACOBS ROTHSTEIN

23 UNITED STATES DISTRICT JUDGE  
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